Office-Supreme Court, U.S.
FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CITATIONS

Cases

	Page
General Trading Co. v. *Tax Comm'n*, 322 U.S. 335	5, 6, 7
Miller Bros. Co. v. *Maryland*, 337 U.S. 340	2, 4, 7
Nelson v. *Montgomery Ward & Co.*, 312 U.S. 373	7
Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365	4, 5, 6, 7
State v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So.2d 91 (1965)	2

Miscellaneous

Comment, 12 N.Y. Law Forum 121 (1936) 12

Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965) 2, 10, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

I

Four significant points emerge from appellee's discussion of the present state of the law applicable to the power of the buyer's State to require foreign sellers to collect its use taxes upon interstate transactions.

First, appellee concedes that this Court has never permitted a State to impose the obligation to collect use taxes upon out-of-State sellers upon so slender a nexus as the

interstate circulation of advertising and goods, where no local business is conducted and no salesmen or solicitors are seeking orders within the State. In every case in which the obligation was upheld the seller had local outlets, or local agents or brokers soliciting sales of its products.

Second, appellee concedes, by its silence, that "collection or payment of sales tax in a state where a firm does only a mail order business is virtually unknown" (*Report* 772);[1] and that only two States — Alabama and Illinois — have asserted a broader obligation. The Alabama Supreme Court rejected the contention. *State* v. *Lane Bryant,* 277 Ala. 385, 171 So.2d 91.

Third, in the only case in this Court in which a State has asserted that interstate advertising and deliveries by an out-of-State seller provide a nexus, the Court held that these contracts would not support imposition of an extraterritorial obligation to collect the buyers' tax. *Miller Bros.* v. *Maryland,* 347 U.S. 340. There is more subjective characterization than fact in appellee's effort (Br. pp. 22-23) to distinguish that decision by listing six elements, "all of

---

[1] As in our original brief, we use the reference *Report* to refer to the report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.Rpt. 565 and 952, 89th Cong., 1st Sess., 1965.

Two statistics given in our general description of the mail-order business, which we derived from the *Report*, appear to be mistaken. Our opening brief, p. 56, states that the five large catalog houses with retail outlets in almost every State account for $1.1 billion of the industry's almost $2.4 billion sales. The $1.1 billion figure is only the sales of the five large catalog houses on which sales or use taxes are paid. *Report* 772. Their total sales must therefore be somewhat larger, since not all States impose sales or use taxes. The $1.3 billion figure cited on p. 40 of our brief, which was obtained by subtracting $1.1 billion from $2.4 billion, is therefore too high. The correct figure cannot be derived from the *Report* but it is obviously very high and the essential fact remains unaltered:

> Collection or payment of a sales tax in a State where a firm does only mail-order business is virtually unknown (*Report* 772)

which are present here, none of which were present in Miller Bros." We discuss the six allegedly distinguishing elements seriatim.

(a) "*An 'exploitation' by National of the State consumer market.*" — The meaning of the characterization "exploitation" is not clear. Comparison of the actual facts shows that Miller advertised more intensively in part of Maryland than appellant in Illinois. Miller sent out regular mailings, which reached Maryland customers four times a year. Appellant sends its main catalogs twice a year. Miller also mailed occasional sales circulars to former customers. Appellant sends out intermediate flyers. In addition, Miller advertised twice a day in newspapers reaching Maryland customers. Appellant has no comparable daily advertising. Appellee mis-states the record when it asserts (Br. p. 15) "clearly National engaged in regular, systematic and substantial Illinois directed and oriented business activities." The record shows that all appellant's advertising, like Miller's, was general (R. 32-33, 68-69, 86-87).[2]

Measured by sales Miller's volume of business was smaller, but it amounted to several thousand dollars annually. Mr. Justice Douglas, on behalf of the Chief Justice and Justices Black and Clark, described it as a regular course of conduct.

(b) "*National's 'regular systematic displaying of its product by catalogs, samples or the like.'*" — Appellant uses no samples (R. 71-72). Obviously, nothing turns on the use of catalogs as opposed to other advertising, or on the number of pictures or degree of detail.

---

[2] Appellee also mis-states the record in its repeated intimations that appellant distributes advertising other than its catalogs. The court below accurately stated that appellant "has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois." (R. 87).

(c) *"Sales were not made to individuals 'personally present' at National's store or factory."* — This is irrelevant. The out-of-State seller's contact with the State where the buyer lives is neither increased nor diminished by the buyer's mailing an interstate order instead of making an interstate journey.

(d) *"There were continual systematic and substantial deliveries into Illinois of National's merchandise."* — In both cases merchandise reached customers in the State of destination. The difference is that Miller made its own deliveries in Maryland, in its own truck, with its own employees, which the dissenters thought decisive in *Miller*. This contact is totally absent from the present case because appellant delivers all its merchandise to the mails or common carriers in Missouri (R. 33, 70). Thus, our position here is entirely consistent with the dissenting opinion in *Miller Bros.* v. *Maryland*.

(e) *"There were regular and continuous sales flyers mailed to Illinois citizens in Illinois."* — The record shows only that there were annually "a number of . . . flyers" (R. 32, 70). Whatever their number, they cannot have possibly been as "regular and continuous" as Miller's daily advertising in the newspapers.

(f) *"National could easily determine that the goods it sold and shipped to Illinois citizens were to be used eventually in the State."* — The same fact appeared with respect to 60 percent of the sales in *Miller Bros.* v. *Maryland*. The Court held that even when this fact appeared, there was no obligation to collect the tax.

Fourth, in the only cases to deal directly with mail-order firms, the Court indicated that exclusively out-of-State sellers could not constitutionally be subjected to use tax obligations. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 373, upheld the power of Iowa to require Sears to collect the Iowa use tax because Sears had retail stores within the

State. Appellee's contention that the stores were irrelevant is belied by the careful reasoning of Mr. Justice Douglas' opinion for the Court (*id.* at 364):

> The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would be merely the result of impotence of State power. *Wisconsin* v. *J.C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business.

Then, acknowledging that there were out-of-State mail-order businesses which did not collect the tax on their sales into Iowa because they did no other, local business, Mr. Justice Douglas observed (*id.* at 365):

> unlike respondent they are not receiving benefits from Iowa for which it has power to exact a price.

Appellant asserts that the "incidental in-State presence of the retail stores were not necessary to the decision reached in *Nelson*" (Br. p. 24). It supports this argument by picking the phrase "constitutionally irrelevant" (Br. pp. 8, 9) out of a quotation from Mr. Justice Frankfurter's opinion in the *General Trading* case (Br. p. 24), while ignoring the context in which the phrase appears. The contention rests upon appellee's confusion of two distinct issues involved in use-tax litigation: (a) whether a State may exact a use tax from those who use within its borders goods purchased from out of State, and (b) whether the State has jurisdiction in the particular case to require the foreign seller to act as collector of the tax. The briefs in the *General Trading* case show that General argued the first issue, but not the second. General's con-

tention was that the use tax was really a sales tax and that Iowa could not tax the sale because there was no taxable event in Iowa, but only an interstate transaction consumated outside the jurisdiction. Brief for Petitioner, No. 441, October Term, 1943. Mr. Justice Frankfurter did not say that the Iowa stores were "constitutionally irrelevant" in general terms. He said that they were "constitutionally irrelevant" (322 U.S. at 338)—

> to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail-order goods.

Sears' Iowa stores were indeed "constitutionally irrelevant" to that issue. But they or the local solicitors were essential to any ruling upon the wholly distinct question of Iowa's jurisdiction to require the foreign seller to collect the tax. Mr. Justice Douglas' *Sears, Roebuck* opinion makes that clear. Mr. Justice Frankfurter said nothing to change or qualify it.

Our argument is upon the latter issue. We do not say that Illinois may not tax the purchasers of mail-order goods, but only that Illinois lacks jurisdiction over the appellant to require it to collect the tax. Appellee's quotation from *General Trading* is therefore irrelevant, and the distinction drawn in the *Sears, Roebuck* case remains controlling.

II

The distinction drawn in the *Sears, Roebuck* case between foreign corporations which have local retail outlets and out-of-State mail-order sellers "who receive no benefits from [the buyer's State] for which it has power to exact a price" is rooted in the fundamental principles governing jurisdiction to tax. The Court has held over and over again, where interstate transactions were in-

volved, that tax burdens may not be imposed by a State unless they bear a reasonable relation to the benefits or protection which the State affords. See authorities cited in our opening brief at pp. 32-33. The principle applies to the imposition of the burdens of acting as tax collector as well as to levy of the tax. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 364-365; *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, 375; *General Trading Co.* v. *Tax Comm.*, 322 U.S. 335, 338, 356-357.

It is too plain for argument that Illinois has conferred no privileges, protection or benefits upon appellant. Appellee says that this statement is "legally specious and not true" because "the incident of the tax is the use or the enjoyment of property within the State" (Br. p. 40). This case is concerned with the burdens of acting as tax collector, not with the legal incidence of the tax. The use or enjoyment of the property by the purchasers is not a privilege or benefit enjoyed by appellant. The power to tax the purchasers' enjoyment does not automatically carry with it the power to tax the seller who is wholly outside the jurisdiction. *Miller Bros.* v. *Maryland*, 347 U.S. 340, 347.

Appellee also says (Br. p. 40) that appellant National enjoys privileges made available by Illinois because —

> National's common carriers, delivering agents and bill collectors continually and systematically use among other less obvious things our roads

The court below faced the facts more fairly (R. 87):

> [National] does not have in Illinois any agent . . . or other type of representative . . . to deliver merchandise, to accept payments, or to service merchandise it sells.

The court's statement is fully supported by the record (R. 34, 70-71).[3] It is also clear that appellant has brought no suits in Illinois (R. 34, 70).

The only argument that could fairly be made in an effort to show that appellant derives benefits from the State of Illinois would be that appellant does business in Missouri with U.S. postal authorities and wholly independent common carriers who operate in Illinois, and by these channels of interstate communication sells merchandise to Illinois residents; that while Illinois confers its protection and benefits only upon the postal authorities, the common carriers and the purchasers, nevertheless from their activities and enjoyment of property in Illinois appellant receives economic advantages in Missouri. But such indirect benefits, derived solely from activities outside the State, that initiate purely interstate commerce, have never been thought sufficient to support the imposition of extraterritorial obligations.

A contrary conclusion would be incompatible with the federal system. Accurately stated, the argument comes down to the proposition that, since Illinois confers benefits upon persons within its borders, it indirectly confers upon anyone outside its borders who deals with them sufficient

---

[3] No record references are given for appellee's references to "National's systematic and continuous collection in Illinois from State residents by defendant's common carriers, independent contractors, or agents of the purchase price of the merchandise sold" (Br. p. 17), its "representatives and their delivery trucks who and which made deliveries of and collections for National's merchandise." (Br. p. 16). These characterizations are utterly unfounded. By the expression "National's common carriers" appellee apparently refers to the Railway Express Agency, to which appellant delivers goods in Kansas City when they are too bulky for mailing (R. 70). Appellant has no ownership, control, or interest, in any common carrier. Appellee's reference to "delivering agents" is even more puzzling. Apparently it refers to the men who carry the U.S. mails. For the record plainly states that appellant does not have any agent or other representative delivering its merchandise in Illinois (R. 70-71). Appellee's reference to "bill collectors" likewise has no support in fact (*ibid*).

benefit to sustain subjecting him to extraterritorial obligations. Upon this theory Massachusetts could tax Florida hotels because the prosperity it bestows upon Massachusetts residents enables them to visit those resorts. Minnesota could tax Michigan factories because her farmers are a market for Michigan's tractors and cars. Idaho could reach out and tax the seller of gasoline in Utah where the property was to be brought into Idaho following the purchase. It was to prevent just such mutual aggressions and economic retaliation that the States entered into the federal union.

III

In its enthusiasm for Illinois' own revenue acts appellee overlooks the fundamental elements of the constitutional question. If Illinois may require an out-of-State enterprise, all of whose own activities are confined to another jurisdiction, to collect Illinois taxes upon Illinois residents because of the interstate circulation of its advertising and goods, then every other sales and use tax State may impose a similar obligation upon the same enterprise, in relation to its citizens. There are more than forty such States. Thus, the constitutional question is whether the imposition of this potentially multiplicitous obligation, as the price of engaging in the national circulation of goods and ideas from a single location, does not violate the constitution by clogging a national market that the due process and commerce clauses are designed to keep free.

Appellee, by silence, admits every one of the facts showing that the burdens imposed by its theory of jurisdiction would operate in a cumulative and discriminatory fashion. One reason, as explained in the report of the Special Subcommittee, is that "the problem of collecting the tax from the customer is . . . more difficult than in a

retail store." *Report* 771. State laws, including Illinois' statute, make the seller liable even if he is unable to collect the tax. Appellee complains that the record contains no evidence of appellant's inability to collect the tax but surely the Court cannot ignore this widely-known, general characteristic of the extraterritorial obligation in appraising its constitutionality.[4] Relevant data is in the Special Subcommittee's report — including references to non-collection rates as high as 75 percent (*Report* 771). Since our experience — an average 40 percent rate of non-collection — was somewhat more favorable, it seemed proper to include it in our brief, not because the particular figure is important but because it helps to illustrate the inherently discriminatory incidence of this kind of obligation.

In addition, the burdens of serving as tax collector for five, ten, twenty, or even fifty States are obviously heavier than the local merchant's duties in acting for a single State, not only because of the sheer increase in mere record-keeping and reports but also because of the added difficulties of working with numerous different laws, tax rates, taxing authorities, auditors and exemptions. We described these problems fully in our opening brief (pp. 22-32, 55-69). Appellee apparently concedes their existence. Its only response (Br. p. 36) is that Illinois avoids a double tax on the same sale by giving credit for any sales tax paid by the seller. To show that one potential source of cumulative burdens has been avoided does not eliminate or even reduce the others.

Furthermore, to speak only of States is to understate

---

[4] Much of the tax could not possibly have been collected by appellant because the assessment levied by Illinois ran back to the effective date of the Illinois Use Tax Act and thus covered a period in which sales were made from catalogs distributed before the Act. See our opening brief p. 41, n. 21. The insinuation that appellant has collected any part of the tax in question is unjust and, to borrow appellee's expression (Br. p. 17), contrary to "the facts."

the case. Appellant does not deny that its theory would subject a national mail-order firm to liability to act as tax collector for hundreds, if not thousands, of municipalities, counties, and other local subdivisions.

IV

Appellee also errs in questioning the relevance of the action in Congress. (Br. pp. 46-47).

First, the Special Subcommittee made the most complete factual study available of the impact of the obligation to collect use taxes upon interstate commerce. Upon that basis it recommended that steps be taken to prevent —

> the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting the tax. (*Report* 884).

At a minimum the finding is persuasive.

Second, the action taken by congressional committees is material because the Court's function in this area is to interpret the silence of Congress. The virtually unanimous action taken first by the Special Subcommittee assigned to study the problem and then by one of the most powerful congressional committees shows that the Congress, far from favoring the expansion of State power and sellers' obligations, seeks to cut them back beyond the point authorized by prior decisions. This is a strong reason for the Court, in interpreting the silence of Con-

gress, not to permit the extension of sellers' obligations into areas not sanctioned by the existing cases. See Comment, 12 N. Y. Law Forum 121, 135-136 (1936).

Respectfully submitted,

ARCHIBALD COX
Langdell Hall
Cambridge, Mass.
HERMAN A. BENJAMIN
41 East 42nd Street
New York, N. Y.
JULIAN R. WILHEIM
208 South LaSalle St.
Chicago, Ill.
Attorneys for Appellant

February, 1967.

BLANK

PAGE